IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS LLC, *et al*., individually and on behalf of all those similarly situated,

Plaintiffs,

v.

INTERNATIONAL PAPER CO., *et al*.,

Defendants.

Case No. 1:10-cv-05711

Hon. Harry D. Leinenweber

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, AUTHORIZATION TO DISSEMINATE NOTICE TO CLASS, AND SETTING A HEARING ON FINAL SETTLEMENT APPROVAL

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I. INTRODUCTION

This Motion is brought on behalf of Plaintiff Class Representatives[1] ("Plaintiffs") for preliminary approval of a settlement agreement (the "Settlement Agreement") (a true and correct copy of which is attached hereto as Exhibit A) between Plaintiffs and Defendants International Paper Company ("IP"), Temple-Inland Inc., now known as Temple-Inland LLC, and TIN Inc., now known as TIN LLC (collectively, "TIN"), and Weyerhaeuser Company ("WY"), collectively referred to herein as "Settling Defendants." Co-Lead Counsel[2] executed the Settlement Agreement on behalf of Plaintiffs individually and on behalf of a certified Class of persons and entities that purchased Containerboard Products[3] in the United States directly from one or more of the Defendants[4] in this Action from February 15, 2004 through November 8, 2010.[5]

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[1] The class representatives are Kleen Products LLC, R.P.R. Enterprises, Inc., Mighty Pac, Inc., Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, MTM Packaging Solutions of Texas, LLC, RHE Hatco, Inc., and Chandler Packaging, Inc.

[2] Michael J. Freed of Freed Kanner London & Millen LLC and Daniel J. Mogin of The Mogin Law Firm, P.C. were appointed as Co-Lead Counsel in this Court's March 26, 2015 Order certifying the class (Dkt. No. 871) ("Class Certification Order"). The Mogin Law Firm, P.C. is now MoginRubin LLP (Dkt. No. 1333).

[3] "Containerboard Products" is defined in the Consolidated Amended Complaints (Dkt. Nos. 65, 622.1, 777.1) ("CAC") and includes linerboard, corrugated medium, rollstock, corrugated sheets and corrugated products including displays, boxes and other containers.

[4] The Defendants are Georgia-Pacific LLC ("GP"), IP, Norampac (also referred to as Cascades Canada, Inc./Norampac Holdings U.S., Inc.), WY, TIN, Packaging Corporation of America ("PCA"), and WestRock CP, LLC (formerly known as Smurfit-Stone Container Corporation ("Smurfit")). On May 27, 2011, Smurfit was acquired by RockTenn Company. To effect the acquisition, Smurfit was merged into a subsidiary of RockTenn Company. The surviving entity from the merger became RockTenn CP, LLC ("RockTenn"), a limited liability company and wholly owned subsidiary of RockTenn Company. On June 16, 2011, the Court allowed RockTenn to be substituted as a defendant in place of Smurfit (Dkt. No. 205). On September 13, 2017, the Court allowed WestRock CP, LLC to be substituted as a defendant in place of RockTenn (Dkt. No. 1052). Settlements were previously reached with Defendants PCA for $17,600,000 (final approval granted on September 3, 2014) and Norampac for $4,800,000 (final approval granted on May 21, 2015). The non-settling Defendants are GP and WestRock.

[5] In its Class Certification Order, the Court certified the Class Period as "from February 15, 2004 through November 8, 2010" (Dkt. No. 871).

Pursuant to the Settlement Agreement, IP has agreed to pay Plaintiffs the sum of three hundred fifty-four million dollars ($354,000,000). (Settlement Agreement ¶ 9). IP will deposit two hundred thousand dollars ($200,000) of this sum within three (3) business days of the Court granting this Motion (Settlement Agreement ¶ 9.a.), and the remaining three hundred fifty-three million eight hundred thousand dollars ($353,800,000) on or before August 1, 2017 (Settlement Agreement ¶ 9.b.). Once deposited, the funds will be invested in instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof, including a U.S. Treasury Money Market Fund or a bank account insured by the FDIC up to the guaranteed FDIC limit. (Settlement Agreement ¶ 10.b.). The Settling Defendants' Containerboard Products sales remain in the case and the remaining non-settling Defendants, GP and Smurfit, are jointly and severally liable for any amounts awarded at trial (subject to reduction for the amount of this and the prior settlements).

The Court previously certified the class that is the subject of the Settlement (the "Class") and that certification was affirmed by the United States Court of Appeals for the Seventh Circuit on August 4, 2016.[6] On September 15, 2016, the Court granted Plaintiffs' Motion for Leave to Disseminate Notice to the Class (Dkt. No. 1053). Notice of the Class Certification Order was provided to Class Members by first-class mail, electronic mail, a case-dedicated website, and publication in *The Wall Street Journal*. The notices explained how Class Members could exclude themselves from the Class, and that they would be bound by the results of the litigation if they did not do so. Requests by Class Members to be excluded from the Class were to be postmarked by December 5, 2016. Plaintiffs received forty-nine (49) timely requests to be excluded and two (2) untimely requests, which the Court honored as valid at Plaintiffs' request

[6] The Supreme Court of the United States denied *certiorari* on April 17, 2017.

(*see* Dkt. Nos. 1080, 1176). Prior to the Class Certification Order, settlement classes were certified by the Court in connection with its approval of settlements with PCA and Norampac. As part of the approval process for the PCA and Norampac settlements, Plaintiffs also provided Court-ordered notices that explained the opt-out process and consequences of not doing so.

Plaintiffs now move the Court to grant preliminary approval of the Settlement Agreement and, in connection therewith, to enter an order that, among other things:

1. Finds the Settlement Agreement to be sufficiently fair, reasonable, and adequate to warrant dissemination of notice to the Class;

2. Approves the Notice Plan including the forms of individual mail notice and published "summary notice" of the Settlement Agreement, attached hereto as Exhibits B and C, and directs the implementation of the Settlement Agreement for the Class accordingly, including:

    A. Setting the date for the Co-Lead Counsel to move for final approval of the Settlement Agreement;

    B. Setting the date for Class Counsel to file a request for an interim payment of attorneys' fees as well a plan of distribution for a portion of the settlement funds available, to be paid after the Effective Date;

    C. Setting the date for Class Members to object to the Settlement Agreement, request for interim payment of attorneys' fees, or plan of distribution;

    D. Setting the date for any reply papers in further support of the Settlement Agreement, request for interim payment of attorneys' fees or plan of distribution, to be paid after the Effective Date; and

    E. Setting the date, time, and place for a hearing on final approval of the Settlement Agreement and any related petitions (the "Fairness Hearing"); and

3. Stays as to Settling Defendants all matters arising under the cases consolidated in this Court under *Kleen Products, LLC et al. v. International Paper, et al.*, Case No. 1:10-cv-05711 (N.D. Ill.) except as provided for in the Settlement Agreement.

At the Fairness Hearing, Co-Lead Counsel will request entry of a final order and judgment ("Final Order") dismissing the Settling Defendants and retaining jurisdiction for the implementation and enforcement of the Settlement Agreement.

II. BACKGROUND

A. Procedural History of the Litigation

This litigation was commenced on September 9, 2010, with the filing of a class action lawsuit by Kleen Products, LLC, on behalf of all direct purchasers of Containerboard Products in the United States (Dkt. No. 1). Plaintiffs filed the Consolidated Amended Complaint ("CAC") on November 8, 2010 (Dkt. No. 65).

On January 14, 2011, Defendants filed motions to dismiss. On January 20, 2011, the Court appointed Michael J. Freed and Daniel J. Mogin to serve as Interim Co-Lead Counsel for the Proposed Class (Dkt. No. 145). On April 8, 2011, the Court entered a Memorandum Opinion and Order denying Defendants' motions (Dkt. No. 193). On May 2, 2011, Defendants filed their Answers denying all material allegations (Dkt. Nos. 194-200). On April 16, 2014, Plaintiffs filed their motion for leave to amend the CAC (Dkt. No. 622). The amendments did not change or add a new claim or legal theory to this case, but amended the Class Period commencement date to February 15, 2004. The Court granted Plaintiffs' amendments to the CAC on May 13, 2014 (Dkt No. 642).

The Court granted final approval of the first settlement in this case with Defendant PCA on September 3, 2014 (Dkt. No. 734). On October 23, 2014, Plaintiffs filed a second motion for leave to amend the CAC (Dkt. No. 777). The amendments clarified that Plaintiffs are seeking to hold Defendant WestRock CP, LLC, formerly known as Smurfit-Stone, liable for Smurfit-Stone's post-bankruptcy conduct, and added allegations regarding the acquisitions by IP of TIN

and of WY's containerboard business. The Court granted Plaintiffs' leave to file amendments to the CAC on November 19, 2014 (Dkt. No. 806).

On March 26, 2015, the Court entered an order granting Plaintiffs' Class Certification Motion (Dkt. No. 871). Defendants filed a Petition for Permission to Appeal the Class Certification Order on April 9, 2015 (Dkt. No. 874). The Court granted final approval of the second settlement in this case with Defendant Norampac on May 21, 2015 (Dkt. No. 902). The United States Court of Appeals for the Seventh Circuit accepted Defendants' interlocutory appeal and affirmed the Class Certification Order on August 4, 2016. *See Kleen Products LLC v. International Paper Company*, 831 F.3d 919 (7th Cir. 2016). Defendants filed a petition for writ of certiorari with United State Supreme Court that was subsequently denied on April 17, 2017. *Id.*, *cert. denied*, __ U.S. __ (U.S. April 17, 2017) (No. 16-841).

On September 15, 2016, the Court ordered dissemination of the Notice of Pendency apprising the Class of the Certification Order, the consequences of class membership, their rights to be excluded from the Class, the procedure for seeking exclusion from the Class, and that Class Members would be bound by any result of this Action if they did not timely request exclusion (Dkt. No. 1053). The Mail and Summary Notices stated that the Class Period is February 15, 2004 through November 8, 2010. Class Members were required to request exclusion from the lawsuit by December 5, 2016. A total of 51 Class Members exercised that right, inclusive of certain extensions of the original deadline established in the Notice as granted by the Court (*see* Dkt. Nos. 1080, 1176). The prior PCA and Norampac settlement notices included similar language on behalf of those respective settlement classes.

Briefing of all dispositive and *Daubert* motions was completed on April 27, 2017. The Court denied the parties' *Daubert* motions on May 31, 2017, with exceptions regarding

Plaintiffs' motion to exclude certain testimony from Dr. Dennis Carlton (granted) and Defendants' motion to exclude Dr. Lawrence Cunningham (granted in part and denied in part) (Dkt. No. 1340).

B. Summary of Plaintiffs' Allegations

This is an antitrust class action filed against certain manufacturers of Containerboard Products in North America. Plaintiffs allege that Defendants engaged in an agreement, combination, or conspiracy to fix, raise, elevate, maintain, or stabilize prices of Containerboard Products sold in the United States, including via various types of supply restrictions. The Defendants deny these allegations.

C. The State of the Record at the Time the Settlement was Reached

This case has been intensively litigated in the almost seven years since the first cases were filed. Nearly every legal or factual issue of any substance has been the subject of motion practice. This includes extensive motions to dismiss, motions for summary judgment, and eleven *Daubert* motions. The class certification motion alone spawned seven separate briefs in this Court that total more than 300 pages (excluding attached exhibits), two sur-replies, and several notices of supplemental authority, followed by an interlocutory appeal, briefing and argument before the United States Court of Appeals for the Seventh Circuit, and finally a petition for writ of certiorari to the United States Supreme Court and related opposing and reply briefs.

Discovery was equally exhaustive. The parties spent almost a year in discovery proceedings before now-retired Magistrate Judge Nan Nolan. Defendants and various third parties produced, and Plaintiffs reviewed, approximately 1.8 million documents (well in excess of 25 million page equivalents) excluding transactional sales data. Plaintiffs conducted over eighty-five (85) depositions of Defendants and third parties. Plaintiffs also produced

approximately 65,000 pages of documents to Defendants and all Plaintiff Class Representatives were deposed. The extensive discovery among the parties led to certain unresolved issues which also required rulings by the Court. Discovery finally completed after years of thorough litigation work by the parties.

Finally, the parties have engaged in extensive expert analysis. Defendants served seven (7) merits expert reports collectively compromising more than 1,000 pages along with thousands of pages of additional backup material. Plaintiffs disclosed three economic experts along with a non-economic rebuttal expert, providing lengthy analyses of liability and damages. Each side's experts were deposed at least once.

The parties fully briefed all dispositive summary judgment and *Daubert* motions. The *Daubert* motions were particularly extensive – with Plaintiffs filing seven (7) and Defendants filing four (4) such motions.

Ultimately, a trier of fact will evaluate the positions of the parties with respect to the evidence in the case. For purposes of this Motion, however, it is sufficient to note that the Settlement Agreement has been entered into after discovery was completed and on the basis of a record that has been exceptionally well-developed over the course of almost seven (7) years of litigation.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

In pertinent part, the Settlement Agreement provides:

A. Release, Discharge, and Covenant Not to Sue

The Settlement Agreement provides for all Plaintiffs (and all "Releasors" as defined in the Settlement Agreement) to release and discharge Settling Defendants upon the Settlement

Agreement becoming final as set forth in the Settlement Agreement at ¶ 4. The release and discharge language in the Settlement Agreement is as follows:

In addition to the effect of any Final Approval Order entered in accordance with this Agreement, upon this Agreement becoming Final as set out in Paragraph 4 of this Agreement, and in consideration of payment of the Settlement Amount, as specified in Paragraph 9 of this Agreement, into the Settlement Fund, and for other valuable consideration, Releasors shall be deemed to have, and by operation of the Final Approval Order shall have, fully, completely, finally, and forever released, acquitted, and discharged the Settling Defendant Releasees from any and all known and unknown, foreseen and unforeseen, suspected or unsuspected, actual or contingent, liquidated or unliquidated, asserted or unasserted, whether in law, equity, or otherwise, claims, demands, judgments, actions, suits, causes of action, obligations, promises, rights, and liabilities of any kind, whether individual or joint and several, including costs, fees, penalties, or losses of any kind or nature, whether actual, punitive, treble, compensatory or otherwise and whether class, individual, derivatively or in any other capacity that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have (whether or not any Class Member has objected to the settlement or makes a claim upon or participates in the Settlement Fund, whether directly, representatively, derivatively or in any other capacity), arising out of or relating in any way to any act or omission of the Kleen Defendants (or any of them) or any other Containerboard Products manufacturer, distributor, or seller concerning the manufacture, production, capacity, supply, distribution, sale or pricing of Containerboard Products from the beginning of time up to the date of Preliminary Approval, including but not limited to any conduct alleged, and causes of action asserted, whether known or unknown, suspected or unsuspected, matured or unmatured, contingent or non-contingent, concealed or hidden from existence, asserted or unasserted, or that

could have been or could still be alleged or asserted, in any class action complaints filed in this or related Actions, including those arising under any federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, civil conspiracy or similar laws, RICO, or trade practice law, (collectively, the "Released Claims"). Nothing in this Agreement shall be construed to release claims for product defect,personal injury or breach of contract, other than for such contract claims related to allegations in the Action, but this Agreement shall not alter or abridge any statute of limitations defenses that may be applicable to such claims. (Settlement Agreement at ¶ 6).

In addition to the provisions of Paragraph 6 of this Agreement, Releasors hereby expressly waive and release, upon this Agreement becoming final, any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which states:

> CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

or by any law of any state or territory of the United States, or principle of common law, present or future law, which is similar, comparable, or equivalent to Section 1542 of the California Civil Code. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims which are the subject matter of the provisions of Paragraph 6 of this Agreement, but each Releasor hereby expressly waives and fully, finally, and forever settles and releases, upon this Agreement becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent claim with respect to the subject matter of the provisions of Paragraph 6 of this Agreement, whether or not

concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

This Agreement does not settle or compromise any claim other than the Released Claims against the Settling Defendant Releasees. The release, discharge, and covenant not to sue set forth in Paragraph 6 of this Agreement does not include claims by any of the Class Members other than the Released Claims and does not include other claims, such as those solely arising out of personal injury, product liability or defect, or breach of contract claims in the ordinary course of business other than for such contract claims related to the allegations in the Action. All rights of any Class Member against any person or entity other than the Settling Defendant Releasees for sales made by the Settling Defendant Releasees are specifically reserved by Plaintiffs and the Class Members. To the fullest extent permitted and/or authorized by law, sales of Containerboard Products by the Settling Defendant Releasees in or into the United States shall remain in the Action against the non-settling Defendants and/or any future defendants other than the Settling Defendant Releasees as a basis for damage claims, and shall be a part of any joint and several liability claims in the Action against the non-settling Defendants and/or any future defendants or persons or entities other than the Settling Defendant Releasees.

B. Settlement Amount

IP has agreed to pay three hundred fifty-four million dollars ($354,000,000) (the "Settlement Amount") to settle this case. IP will deposit two hundred thousand dollars ($200,000) into an escrow account within three (3) business days of the Court granting this Motion for Preliminary Approval to be applied toward Notice and Administration costs. The remaining three hundred fifty-three million eight hundred thousand dollars ($353,800,000) will be deposited to an escrow account on or before August 1, 2017.

C. Settlement Reduction

The Settlement Agreement provides IP with a potential reduction of the Settlement Amount with respect to any future settlements reached between Plaintiffs and GP prior to either the empaneling of a jury at trial or the date the Court grants summary judgment in favor of GP (the "Pretrial Period"). (Settlement Agreement at ¶ 9.d.). In this regard, the agreement provides that the Settlement Amount shall be reduced by three times the amount of any difference between $118 million and the actual amount of settlement with GP, up to $118 million. This formula is based on the respective shares of sales during the Class Period of GP and the Settling Defendants – the share of the Settling Defendants being three times greater than the share of GP (Settlement Agreement at ¶ 9.d.). The entire Settlement Amount (less the Notice and Administration fees) will be held in escrow until the settlement is Final (as defined in the Settlement Agreement) and $118 million will be held in escrow until the conclusion of the Pretrial Period. (Settlement Agreement at ¶ 9.d.). Settlement reduction clauses have been approved by courts in this district. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litigation*, 94 C 897 (MDL No. 997), 1996 WL 351180 (N.D. Ill. June 24, 1996); *Matter of VMS Ltd. Partnership Securities Litigation*, 90 C 2412, 1991 WL 134262 (N.D. Ill. July 16, 1991).

D. Notice

Co-Lead Counsel propose to provide notice to the Class both by mail and by publication. Individual Notice (the "Mail Notice") will be sent via first class mail to all entities within the Class. *See* proposed Mail Notice attached hereto as Exhibit B. Counsel for Plaintiffs also propose that summary notice be made by publication in the national edition of *The Wall Street Journal* ("Summary Notice"). *See* proposed Summary Notice, attached hereto as Exhibit C. The

Settlement Administrator, A.B. Data, Ltd., will publish the notices and other important documents on the website www.containerboardproductscase.com. In addition, a portion of the Settlement Fund will be applied to payment of costs related to the giving of notice (as described in Section B above and more fully in ¶ 11.b. of the Settlement Agreement).

E. Proposed Plan of Distribution

Plaintiffs propose a distribution in the amount of $165 million from the Settlement Fund to Class Members. Within forty-five (45) days after the date of entry of the Preliminary Approval Order, Co-Lead Counsel will file a proposed plan of distribution with the Court.

F. Attorneys' Fees and Expenses

a. The Settlement Agreement provides that "Co-Lead Counsel may submit an application or applications to the Court [] for distribution of fees and expenses to Class Counsel from the Settlement Fund (including other Settlement Funds in the Action) and Settling Defendants shall not oppose such application for: (i) an award of attorneys' fees not in excess of one-third of the Settlement Fund; and (ii) reimbursement of expenses and costs incurred in connection with prosecuting the Action, plus interest on such attorneys' fees, costs and expenses at the same rate and for the same period as earned by the Settlement Fund(s) (until paid) as may be awarded by the Court []. Co-Lead Counsel reserve the right to make additional applications for fees and expenses incurred, but in no event shall Settling Defendants or the Settling Defendant Releasees be responsible to pay any such additional fees and expenses except to the extent they are paid out of the Settlement Fund(s)." (Settlement Agreement at ¶ 18.a.). Within forty-five (45) days after the date of entry of the Preliminary Approval Order, Class Counsel will submit a petition for payment of interim attorneys' fees, to be paid after the Effective Date (as defined in the Settlement Agreement), in an amount not to exceed 30% of the Settlement ($354 million), or approximately $106.2 million, with 30% of that amount ($31.86 million) to be held

in an escrow account until resolution of the settlement reduction clause.

IV. STANDARDS APPLICABLE TO DETERMINING WHETHER THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AS TO THE SETTLEMENT CLASS

A. Governing Standards

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation"); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement"), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (*citing Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). However, a class action may be settled only with court approval. And, before the court may give that approval, all class members must be given notice of the proposed settlement in the manner the court directs. Fed. R. Civ. P. 23(e).

Generally, before directing that notice be given to the class members, the court makes a preliminary evaluation of the proposed class action settlement. The Manual For Complex Litigation (Fourth) § 21.632 (2004) explains:

> Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation . . . The Judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and the date of the [formal Rule 23(e)] fairness hearing.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992); *Armstrong*, 616 F.2d at 314; *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y 1997). A court's authorization to disseminate notice constitutes its recognition that the settlement is within the range of possible approval. *See Armstrong*, 616 F.2d at 309-310; *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981). As one court has noted, approving dissemination of notice "is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Ass'n E. R.R.*, 627 F.2d 631, 634 (2d Cir. 1980).

A proposed settlement falls within the "range of possible approval" under Rule 23(e) when it is conceivable that the proposed settlement will meet the standards applied for final approval. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e); *see Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99.

When authorizing the dissemination of notice, a court does not conduct a "definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315-16 (D. Md. 1979)). That determination must await the final hearing where

the fairness, reasonableness, and adequacy of the settlement are assessed under the factors set forth in *Armstrong*.[7]

B. The Settlement is Fair and Resulted from Arm's Length Negotiations

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.,* 564 F. Supp at 1383. There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's length negotiations. *See* 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985); *Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. October 10, 1995) ("it may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations"). Settlements proposed by experienced counsel and which result from arm's length negotiations are entitled to deference from the court. *See*, *e.g.*, *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery") (*quoting Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts' understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e). In making the determination as to whether the proposed settlement is fair, reasonable, and adequate, the Court necessarily will evaluate the judgment of the attorneys for the parties regarding the

[7] The factors that a court considers on a motion for final approval of a class settlement as fair, reasonable, and adequate include: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants' ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *Armstrong,* 616 F. 2d at 314.

"strength of plaintiffs' case compared to the terms of the proposed settlement." *In re AT&T Mobility Wireless Data Servs. Sales Litig.,* 270 F.R.D. 330, 346 (N.D. Ill. 2010).

The Settlement reached here is the product of intensive settlement negotiations. The PCA settlement was for $17.6 million for about 7% of the U.S. market – nearly $2.5 million per percentage of the market. The Norampac settlement was for $4.8 million for approximately 0.8% of the U.S. market. IP has agreed to pay $354 million for about 51% of all Defendants' sales during the Class Period. This Settlement, like the earlier ones with PCA and Norampac, does not affect the potential full recovery of damages for the Class under the antitrust laws in light of the facts that: (i) Defendant's sales will remain in the litigation as part of the settlement, and (ii) under the provisions of Section 1 of the Sherman Act, 15 U.S.C. § 1, the remaining non-settling Defendants will continue to be jointly and severally liable for any judgment which may be entered in this litigation in favor of the Plaintiffs. *See Paper Sys. Inc. v. Nippon Paper Indus. C. Ltd.*, 281 F.3d 629, 632 (7th Cir. 2002) ("each member of a conspiracy is liable for all damages caused by the conspiracy's entire output").

Until this Settlement was entered into, Settling Defendants forcefully contested all aspects of the case for almost seven (7) years. On the issue of class certification, Defendants' interlocutory appeal resulted in briefing and argument before the United States Court of Appeals for the Seventh Circuit. Upon class certification being confirmed on appeal, Settling Defendants filed a petition seeking *certiorari* before the United States Supreme Court that was subsequently denied.

While Plaintiffs believe that their case is strong, any complex antitrust litigation is inherently costly and risky, and this Settlement greatly mitigates that risk and protects the Class. In addition to a monetary payment, the Settlement will provide additional benefits to the

members of the Class, including cooperation from the Settling Defendants as provided in the Settlement Agreement, intended to help streamline trial. Conversely, Settling Defendants believe their case is strong and that they would achieve success on the merits. But, in the interests of avoiding the risk and uncertainty of trial, Settling Defendants have agreed to settle their claims.

In sum, the Settlement Agreement: (1) provides substantial benefits to the class; (2) is the result of extensive good faith negotiations between knowledgeable and skilled counsel; (3) was entered into after extensive factual investigation and legal analysis occurring for almost seven years; and (4) in the opinion of experienced Class Counsel, is fair, reasonable, and adequate to the Class. Accordingly, Co-Lead Counsel believe that the Settlement Agreement is in the best interests of the Class Members and should be preliminarily approved by the Court for the purposes of sending notice of the Settlement to the Class.

V. THE PROPOSED NOTICE TO THE CLASS

Federal Rule of Civil Procedure 23(e)(1) provides that "[t]he Court must direct notice in a reasonable manner to all class members who would be bound by the proposal." While the Court has discretion as to the form and content of the notice, the notice must meet certain due process requirements. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-177 (1974). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [settlement] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice must be given, moreover, "in a form and manner that does not systematically leave an identifiable group without notice." *Mendoza v. Tucson School District*, 623 F.2d 1338, 1351 (9th Cir. 1980) (quoting *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 853 (9th Cir. 1976)). The content of the notice "may

consist of a very general description of the proposed settlement" and should provide a fair recital of its terms. *Id.*

The content and proposed method of dissemination of notice in this case fulfill the requirements of Rule 23(e)(1) and due process. *See generally In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 326-27 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); *Mangone v. First USA Bank*, 206 F.R.D. 222, 233-234 (S.D. Ill. 2001); *In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 WL 765086, at *1 (N.D. Ill. June 12, 2000); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. at 252-53. Plaintiffs propose sending the Mail Notice via first class mail, postage pre-paid, to all members of the certified Class, except for those that previously requested to be excluded. In addition, the Summary Notice will be published once in the national edition of *The Wall Street Journal*. This proposed notice program is substantially the same as those approved by the Court and implemented for the PCA and Norampac settlements and the Notice of Pendency provided to the certified Class. *See, e.g.*, this Court's Orders granting leave to Disseminate Notice to the Litigation Class (Dkt. No. 1053), and Preliminarily Approving the PCA and Norampac Settlements (authorizing notice by First Class Mail and publication in *The Wall Street Journal*) (Dkt. Nos. 634, 862); *In re Aftermarket Filters Antitrust Litig.*, No. 08-CV-4883, Dkt. No. 1036 (N.D. Ill Nov. 8, 2012) (Order granting preliminary approval and authorizing notice by First Class Mail and publication in *The Wall Street Journal*). The Summary Notice will explain how additional information, including a copy of the Settlement Notice, can be obtained by any member of the Class.

The proposed notice will apprise Class Members of the material terms of the Settlement Agreement and outline the available procedures and related deadlines. These include the method for a Class Member to object to the terms of Settlement Agreement.

Further, the Mail Notice will advise the Class Members that Co-Lead Counsel may use the Settlement Fund: (a) to pay for reasonable expenses associated with the costs of giving notice and administration of the Settlement Fund; (b) distribute funds to Class Members; and (c) subject to Court approval, for payment of interim fees and expenses incurred by Co-Lead Counsel for prosecution of the Action on behalf of the Class against non-settling Defendants. The Mail Notice will also advise Class Members that Co-Lead Counsel endorse the Settlement.

The notices will also inform Class Members of the date and place of the hearing at which the Court will consider final approval of the Settlement Agreement. Finally, the Settlement Administrator, A.B. Data, Ltd. will provide the notices and other important documents on the website www.containerboardproductscase.com.

VI. THE REQUESTED PROCEDURES AND TIMETABLE

Co-Lead Counsel propose the following schedule to be reflected in the Court's order granting preliminary approval of the Settlement:

1. A.B. Data, Ltd. shall continue to be the third-party Settlement Administrator to effectuate the Notice Plan and otherwise administer the Settlement.

2. Within fifteen (15) days after the date of entry of the preliminary approval order, the Mail Settlement Notice will be sent by first class mail to all potential Class Members identified by Co-Lead Class.

3. Within thirty-five (35) days after the date of entry of the preliminary approval order or as soon thereafter as is feasible the Summary Notice shall be published once in the national edition of *The Wall Street Journal*.

4. Within forty-five (45) days after the date of entry of the preliminary approval order, Class Counsel will file their interim fee petition and proposed plan of distribution.

    A. Any objections to the Settlement, requests to be heard at the final approval hearing, or entry of a separate appearance for a member of the Class must be filed with the Court and served on Co-Lead Counsel and counsel for Settling Defendants no later than forty-five (45) days after the date of the sending of the notice.

5. Co-Lead Counsel and/or Settling Defendants may file with the Court any additional papers in support of approval of the Settlement Agreement fourteen (14) days before the final approval hearing.

6. Co-Lead Counsel shall file with the Court a motion for final approval of the Settlement Agreement fourteen (14) days before the final approval hearing.

7. Co-Lead Counsel shall file with the Court affidavit(s) or Declaration(s) of the person(s) under whose general direction the mailing and publication of the Notices were made, showing that mailing and publication were made in accordance with the Order seven (7) days before the final approval hearing.

8. The Court will hold the final approval hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure at _____ a.m./p.m. on _____, 2017 at 219 S. Dearborn St., Courtroom 1941, Chicago, Illinois 60604.

Submitted herewith for the Court's consideration is a [Proposed] Preliminary Approval Order which is consistent with the requests made herein.

VII. CONCLUSION

On the basis of the forgoing, Co-Lead Counsel respectfully request that the Court grant (i) Preliminary Approval of Proposed Settlement, (ii) Authorization to Disseminate Notice, and (iii) Set a Hearing on Final Settlement Approval.

Dated: June 27, 2017

Respectfully Submitted,

/s/ Michael J. Freed

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